

A TRAP FOR THE UNWARY: CAN A COMPANY DENY ADVICE-OF-COUNSEL EVIDENCE?

Where a company is a direct litigation adversary to one of its officers or directors, the corporate official usually may rely on the well recognized sword-and-shield rule that prevents the company from suing her and then denying access for her defense to privileged communications with company counsel on which she relied. The situation is less certain in cases where the company is not the corporate official's litigation opponent. This is particularly so in securities cases where the company has bailed out and left the corporate official to fend for herself.

A company might selectively disclose privileged information to settle government enforcement matters in a jurisdiction allowing such a limited waiver, thus retaining the option to assert counsel privileges against others. The company might settle with the government and private litigants without waiving privileges. Or it might remain a co-defendant with an officer or director in ongoing litigation and insist on maintenance of the privileges by both. In each circumstance, most courts have relied on the standard rule that privileges belong only to the company, even where assertion of the privilege would deny the corporate official access to legal advice on which he relied in taking the action for which he is being sued.

Although it arose in the context of a municipal corporation, the Sixth Circuit's September 2005 decision in *Ross v. City of Memphis*, 2005 U.S. App. 19756 (6th Cir. 2005), illustrates the problem. The City and its police official were defendants to a §1983 claim where the official raised a qualified immunity defense based on his taking the advice of the City's attorney for the conduct subject to the plaintiff's claim. The City asserted privilege in its defense and insisted that it be honored by the official. Considering the importance of the evidence to the official, the purposes of the counsel privileges and fairness to the litigants, the district court held that the City's privilege must give way to the official's evidentiary need. On appeal, however, the Sixth Circuit reversed, relying on the rule that the corporation controls the privilege, and interpreting *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) as holding that the official could not control the privileges *post hoc*. The Sixth Circuit opinion makes clear that, to have access to the attorney's advice in his defense, the official had to have made it clear at the time he received the advice that he was seeking personal advice. The opinion is unclear how that was possible if the official was seeking and taking the counsel advice to perform his official duties.

The Sixth Circuit's approach ignores the dual concerns any corporate official has in following legal advice provided by the company. If she is aware that she cannot count on using that advice in future to defend herself individually, she will seek outside counsel responsive only to her; and she should reasonably expect the company to pay for the

expense of that representation. If she is not aware that she could be denied evidence of advice from company counsel, she will be left without a critical defense when called to account for taking that advice.

Standard ethics rules offer no resolution. While current ABA Model Rule of Professional Responsibility 1.13(f) requires counsel to inform corporate personnel that he represents only the company, he is required to do so only when the interests of the individual and the company appear adverse. Where the counsel is giving an executive, or the Board of Directors, or a Board committee legal advice, there is typically no appearance that the interests of the individuals and the company are adverse. Indeed, since the purpose of the advice is to serve the interests of the company, and derivatively those of its owners, it would be illogical for an official to seek to protect his personal interest. Yet, that is what the *Ross* court would require to preserve an individual's right to evidence of the advice he relied on.

There is a better – and simpler – way. Not surprisingly, it appears in decisions of the Delaware courts which simply state that a company cannot deny an official evidence of advice of counsel on which the official relied and for which she is being sued. See *Kirby v. Kirby*, 1987 Del. Ch. LEXIS 463, No. Civ. A 8604 (De. Ch. July 29, 1987); *Moore Business Forms, Inc. v. Cordant Holdings Corp.*, 1996 Del. Ch. LEXIS 56, Civ. A Nos. 13911, 14595 (Del. Ch. June 4, 1996). This recognizes the director's right to present all the relevant evidence in her defense, while preserving the company's control of the privilege when it does not conflict with that right.

Until other courts recognize the wisdom of the Delaware Chancery court, **the prudent and fair procedure is to provide by by-law that the company will control the counsel privileges, unless the Board expressly modifies that authority. This will leave the Board with the choice (1) to adopt the Delaware rule as its corporate rule, (2) to allow adoption of the Delaware rule on a matter basis, or (3) to hold to a rigid company-control rule.**

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